

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD L. MORRIS and DEPARTMENT OF THE INTERIOR,
BUREAU OF RECLAMATION, Chama, NM

*Docket No. 00-1149; Submitted on the Record;
Issued December 5, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective January 21, 1999 based on its determination that the selected position of data entry clerk reasonably and fairly represented his wage-earning capacity.

On November 27, 1996 appellant, a retired electronics mechanic, filed a notice of occupational disease and claim for compensation (Form CA-2), alleging that he suffered from severe arthritis of the right ankle, knees, hips, shoulders and elbows as a result of his federal employment. He identified December 30, 1993 as the date he first realized his condition was caused or aggravated by his employment. Appellant ceased working September 18, 1995 and subsequently retired on disability effective August 2, 1996.

The Office accepted appellant's claim for aggravation of preexisting right ankle arthritis and appellant received appropriate wage-loss compensation.

The Office subsequently referred appellant for a further medical evaluation to ascertain the extent of his employment-related disability. The medical evidence obtained indicated that from an orthopedic standpoint appellant was capable of working an 8-hour day with certain restrictions. The Office then referred the case to a rehabilitation counselor to assist in identifying and determining the availability of suitable employment.

By decision dated January 21, 1999, the Office found that the position of data entry clerk reasonably and fairly represented appellant's wage-earning capacity. Consequently, the Office reduced appellant's wage-loss compensation.

Appellant sought reconsideration on three occasions. The Office denied appellant's initial request for reconsideration on March 15, 1999 without reaching the merits of his claim. With respect to appellant's second request for reconsideration, the Office denied modification in a merit decision dated August 26, 1999. In response to appellant's most recent request for

reconsideration, the Office again reviewed the claim on the merits and denied modification by decision dated January 10, 2000.

The Board has duly reviewed the case record and concludes that the Office improperly determined that the selected position of data entry clerk reasonably and fairly represented appellant's wage-earning capacity.

Once the Office accepts a claim, it has the burden of proof to establish that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.¹

An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.² Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, or if the employee has no actual wages, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his or her disabled condition.³

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position listed in the Department of Labor's *Dictionary of Occupational Titles*, or otherwise available in the open labor market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.⁴

The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects appellant's vocational wage-earning capacity. The Board has stated that the medical evidence upon which the Office relies must provide a detailed description of appellant's condition.⁵

¹ *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

² 20 C.F.R. §§ 10.402, 403; see *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

³ 5 U.S.C. § 8115(a); see *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

⁴ *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁵ *Samuel J. Russo*, 28 ECAB 43 (1976).

In determining appellant's current medical condition and work restrictions, the Office relied on the January 28, 1998 report of Dr. Mohinder A. Mital, a Board-certified orthopedic surgeon and Office referral physician. In summary, he concluded that appellant continued to suffer from residuals of his employment-related condition. And while appellant was incapable of resuming his prior employment duties, Dr. Mital found that he could resume full-time employment of a sedentary nature. In his narrative report, Dr. Mital stated that appellant was "capable of doing electronic equipment repair on a bench-type basis ... where he can sit and work with the upper extremities, does not have to stand, walk or put weight and subject the lower limbs to extreme changes of temperature or humidity."⁶ With respect to future medical treatment, Dr. Mital noted that appellant had previously been advised that he was a candidate for arthroscopic debridement of the right ankle, but that appellant wanted to delay any type of surgical intervention for as long as possible. Dr. Mital expressed agreement with the recommended arthroscopic procedure.

On September 8, 1998 Dr. Edward C. Pino, an orthopedic surgeon, performed a right ankle arthroscopic debridement of osteoarthritis with chondroplasty. The procedure was followed by a period of physical therapy. On January 14, 1999 Dr. Pino released appellant to "activities as tolerated."

Despite the fact that appellant underwent surgery following Dr. Mital's January 28, 1998 examination, the Office relied upon Dr. Mital's assessment as a basis for determining the extent of appellant's condition and his work tolerance level. At the time the Office modified compensation in January 1999, appellant was still recuperating from ankle surgery performed approximately four months earlier. It appears that neither the Office nor the rehabilitation counselor considered the potential effect of appellant's surgery on his ability to perform the duties of a data entry clerk. The rehabilitation counselor's final report dated September 20, 1998 makes no mention of appellant's September 8, 1998 surgery.⁷ Additionally, while the Office received information regarding appellant's surgery as early as September 28, 1998, none of the relevant decisions, beginning with the December 21, 1998 notice of proposed reduction of compensation, make any reference to appellant's surgery.

Throughout the adjudication process the Office has consistently found that Dr. Mital's January 28, 1998 report represented the weight of the medical evidence regarding appellant's ability to perform the duties of a data entry clerk. Almost a year lapsed between Dr. Mital's examination and the Office's January 21, 1999 decision. During that timeframe appellant underwent surgery. Given the fact that Dr. Mital was not aware of a significant medical development, the Office may not rely upon his January 28, 1998 opinion as a basis for determining appellant's current medical restrictions. Furthermore, as the record is devoid of any affirmative medical evidence that appellant's post-surgical condition is compatible with the

⁶ Dr. Mital also submitted a work capacity evaluation (Form OWCP5) wherein he further described appellant's physical limitations.

⁷ In fact, the report indicates that the rehabilitation counselor did not have any contact with appellant during the period of July 28 through September 19, 1998.

duties of a data entry clerk, the Office has failed to carry its burden to justify modification of compensation benefits.⁸

The January 10, 2000 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
December 5, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member

⁸ *James B. Christenson, supra* note 1.